(2)

No. 91-528

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

MATE PICINIC,

Petitioner,

vs.

SEATRAIN LINES, INC., SEATRAIN REALTY CORP., and JACKSON TANKER CORP.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION – FIRST DEPARTMENT

RESPONDENTS' BRIEF IN OPPOSITION

LAWLOR, CAULFIELD, GALVIN, HELLER & HARRIS
Attorneys for Respondents
80 John Street
New York, New York 10038
(212) 493-6300

DAVID S. HELLER, ESQ.
Counsel of Record

QUESTIONS PRESENTED

1. Was the dismissal of petitioner's complaint for failure to comply with a conditional order of dismissal, issued after six years of dilatory litigation tactics in accordance with settled New York State law, a denial of petitioner's right to due process?

2. Does the dismissal of petitioner's complaint present a substantial federal question meriting review by this Court?

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TABLE OF AUTHORITIES

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SUMMARY OF ARGUMENT

A state court may constitutionally dismiss a pleading as a sanction for a party's failure to provide court-ordered discovery. *Hammond Packing Co.* v. *State of Arkansas*, 212 US 322 (1909). This petition seeks review of a state court's dismissal of a personal injury complaint after literally years of disregard and flat defiance of state court directions to furnish discovery. From the institution of this action in 1983 until its dismissal in 1989, petitioner was afforded the opportunity to conduct this litigation

in an orderly and professional manner and to pursue his personal injury claim consistent with the due process dictates of the Fifth and Fourteenth Amendments. That petitioner failed to do so does not constitute a due process violation on the part of the state court which dismissed his complaint, nor is any substantial federal question presented thereby which merits Supreme Court review. 28 U.S.C. Sec. 1257.

STATEMENT OF THE CASE

The underlying action seeks to recover for personal injuries allegedly sustained when petitioner tripped and fell at his place of employment on April 28, 1980. Petitioner commenced his lawsuit in the Supreme Court of the State of New York, New York County, by service of a summons and complaint on April 20, 1983, barely one week before the applicable personal injury statute of limitations would have barred the action as untimely. In July, 1983, defendant served a demand to take petitioner's deposition pursuant to applicable New York court rules (Appendix A). Rather than submitting to an oral examination of his claims, petitioner embarked upon a six years odyssey of avoidance and delay in providing discovery by moving for a protective order vacating the demand (Appendix B). This motion was denied by order of the New York State Supreme Court dated August 8, 1983. The Supreme Court further ordered that petitioner submit to a deposition August 22, 1983 (Appendix C), which the petitioner failed to do. Defendants thereafter moved once more for an order directing plaintiff to appear for a deposition and submit to a physical examination (Appendix D). Petitioner thereupon moved to stay all discovery pending the hearing and determination of a related appeal. This motion resulted in a stay of all proceedings without prejudice to defendants' right to conduct discovery after determination of the appeal (Appendix E).

This appeal was determined in favor of the defendants by the Appellate Division, First Department of the Supreme Court of the State of New York. Rather than providing the long-sought discovery, petitioner then attempted to place the action on the

trial calendar. In conjunction with this attempt, petitioner's present counsel served and filed what is termed a Certificate of Readiness, dated June 17, 1986, falsely stating under oath that service of a Bill of Particulars, a physical examination of plaintiff by defendants' physicians, the exchange of medical information as well as other discovery devices, including depositions were "not required" (Appendix F). This compelled defendants to make a motion to strike the action from the trial calendar, and to force petitioner to comply with outstanding discovery demands. Defendants' motion resulted in a Special Master's recommendation to strike the case from the calendar upon the grounds that the defendants had not had a reasonable opportunity to depose the plaintiff, contrary to the Certificate of Readiness (Appendix G). This recommendation was later adopted by the Supreme Court, and, in order to secure the discovery, defendants moved for a conference and to have the court supervise the proceedings (Appendix H). Despite the fact that his client had not been deposed or examined by defendants' doctors, petitioner's counsel filed a cross-motion once more seeking to strike all discovery demands and to terminate discovery (Appendix I).

These motions resulted in an order of the Supreme Court granting defendants motion, setting a date for depositions of all parties and directing that plaintiff furnish CAT Scans taken in 1981, *inter alia*. Petitioner again sought to avoid providing discovery by appealing from this order and defaulting in complying with the court's directions (Appendix J). Although an interlocutory appeal was filed from this order, it was never perfected and was finally dismissed on defendants' motion (Appendix K).

The passage of time coupled with the petitioner's refusal to comply with the most rudimentary discovery demands had prejudiced the ability of defendants to defend the lawsuit, necessitating a motion to dismiss the complaint. On September 7, 1989 the Supreme Court granted the motion unless petitioner appeared for a deposition, submitted CAT scans that had been taken of him and underwent at least one medical examination by October 23, 1989. The court further conditioned its order

upon the payment of $1,000 by petitioner's counsel to defendants' law firm. The Supreme Court found that petitioner has been guilty of dilatory practices which had severely prejudiced the defendants, and the petitioner was clearly warned that "Failure to comply with any of the above directions shall result in the striking of the complaint and dismissal of the action. . ." (Appendix L). Petitioner did not appeal this order or seek a protective order pursuant to the appropriate provisions of the New York Civil Practice Law and Rules ("CPLR"). Neither did he, or any of the attorneys in his employ, comply with the order. (Appendix M)

Instead, as noted by the Appellate Division – First Department, "plaintiff waited until some of the court-ordered dates had passed and then sought reargument. Since plaintiff was well aware of the terms of the conditional order of dismissal, and no satisfactory excuse has been proffered for his non-compliance, dismissal of the complaint was proper. . ." (Appendix N). That court further noted that almost no discovery had been provided, although the accident had allegedly occurred in 1980, and that the petitioner "had frustrated defendants attempts to conduct discovery." Contrary to petitioner's statement of facts, neither the Supreme Court nor the Appellate Division found that petitioner's failure to provide an affidavit of actual engagement was the reason for the dismissal. Indeed, the affidavit was never submitted to the Court below, even belatedly, nor was it a part of petitioners' record on appeal. Rather it appeared for the first time in a motion to re-argue the Appellate Division's affirmance of the Trial Court's dismissal. In actuality, the complaint was dismissed due to petitioner's persistent and contumacious refusal to provide discovery and the prejudice to the defendant which naturally resulted from his dilatory tactics.

ARGUMENT

POINT I

NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED

It is a basic tenent of appellate practice that the Supreme Court will not review the judgment of a state court unless a substantial federal question is presented. *Zucht v. King*, 260 U.S. 174 (1922). The bare averment of a federal question is not sufficient to invoke federal jurisdiction. *City of New Orleans v. New Orleans Water Works Co.*, 142 U.S. 79 (1891). The petitioner herein presents no basis for his claim. The dismissal of his complaint was nothing more than a condign response by the court below to petitioner's six-year history of dilatory tactics. The petition does not seek to review any novel question of law or procedure, nor does it seek to resolve a conflict between federal or state courts. The dismissal of petitioner's complaint does not involve any important public policy issue, nor does it have any effect other than to discontinue vexatious litigation which had gone on for too long with too little merit.

The power of a state court to dismiss a complaint for failure to dismiss a complaint for failure to provide discovery was reviewed by the Court in *Hammond* v. *Arkansas*, *supra*. The majority opinion (*per* Mr. Justice White) stated that the exercise of the power to dismiss in circumstances similar to those presented herein was entirely proper. In such cases, striking a pleading is an exercise of authority based upon the presumption that the defaulting party lacks a meritorious defense (or cause of action) and such a dismissal is not repugnant to federal constitutional rights.

In the case at bar, a trial judge exercised her discretion to penalize a party for a six year history of wilful and contumacious defiance of discovery orders, including an explicit final-opportunity order. This exercise of discretion was explicitly authorized by state law. N.Y. CPLR 3126(3). Furthermore, the

State's highest Court has upheld both that statute and the exercise of its power by a trial court. *Zletz v. Wetanson*, 67 NY2d 711, 499 NYS2d 933 (1986). Finally, both the Appellate Division and the New York Court of Appeals unanimously upheld the trial judge's action.

It is elementary to the orderly dispensation of justice that, faced with a wilfull and contumacious disobedience of its orders, a court must be able to visit sanctions, including the striking of pleadings, upon the recalcitrant party. This Court has so held since *Hammond Packing v. State of Arkansas, supra.*

Hammond Packing, was specifically in the minds of the authors of the Federal Rules of Civil Procedure, which call for just such sanctions as Petitioner now claims to be Unconstitutional. See FRCP 37(b)(2)(iii) and the notes of the Advisory Committee.

The Advisory Committee's notes distinguished *Hovey v. Elliot*, 167 US 409 (1897), yet, incredibly, Petitioner cites that case, which concerns punishment for contempt, as if it were controlling authority.

Compounding petitioners disingenuous use of citation, is his treatment of the recent history of the *Hovey/Hammond* distinction. The Supreme Court has treated with those cases three times. Petitioner mentions the first two such occassions; namely *Societe Internationale v. Rogers*, 357 US 197 (1958), and *Logan v. Zimmerman*, 455 US 422 (1982). He simply ignores the third, which is the most recent and the most authoritative case, *Insurance Corp. of Ireland v. Compagnie Des Bauxites de Guinea*, 456 US 694 (1982).

In *Societe Internationale*, supra, plaintiff could not comply with certain discovery demands without violating the penal law of a foreign sovereign. The Court found that plaintiff had shown good faith. 357 US at 201. In the case at bar, petitioner refused simple civil discovery and was held to be wilful and contumacious.

In *Logan*, supra, a complainant, through no fault of his own, missed a short statutory statute of limitations by five days, because the state's factfinding body had mis-scheduled a conference. 455 US at 426. *Hovey* and *Hammond* are mentioned in a string citation to the effect that there are Constututional limitations on arbitrary dismissals of civil causes of action. To compare the faultless five day default in *Logan* with Petitioner's six year compaign of defiance is simply not serious.

In *Insurance Company of Ireland*, supra, this Court (Justice White writing for a Court unaminous in the result, Justice Powell concurring) authoritatively applied the *Hovey/Hammond* distinction to FRCP 37, and held dismissal of a pleading (there, the striking of a defense) was Constitutionally proper.

> "The expression of legal rights is" often subject to certain procedural rules: The failure to follow these rules may well result in a curtailment of the rights. . .
>
> Rule 37(b)(2)(A) itself embodies the standard established in *Hammond Packing Co. v. Arkansas*, 212 US 322, 53 L Ed 530, 29 S Ct 370 (1909), for the due process limits on such rules. There the Court held that it did not violate due process for a state court to strike the answer and render a default judgment against a defendant who failed to comply with a pretrial discovery order. . .

Insurance Corp. of Ireland v. Compagnie Des Bauxites, supra, 456 US at 705-706.

The Federal Courts have exercised their power under FRCP 37, as indeed they must unless anarchy is to reign in the Courts. See, e.g., a case remarkably similar to the one at bar, *National Hockey League v. Metropolitan Hockey Club*, 427 US 639, 640-641 (1976)(dismissal after 17 months defiance); rehearing denied 429 US 874. In *National Hockey League* an Appellate Court reversed the trial Court's exercise of discretion, and this Court reversed and re-instituted the dismissal. In the case at bar, no judge has even expressed doubt that the trial Court was, if anything, too long-suffering with the recalcitrant petitioner.

Mindful, perhaps, of the wide swath of disruptive behavior that petitioner has carved through the state and federal Courts, the trial court exercised its discretion, based on a six year record, in such a way as to be unanimously upheld in the State Court system. Any alternative ruling, indeed, would have been conducive of the notorious disruptive tactics of Petitioner's attorney, Kenneth Heller, which has been commented on in no less than nine reported cases. See *Wilkens v. American*, 401 F.2d 151 (2d Cir. 1968); *Ten v. Svenska Orient*, 87 FRD 551 (SDNY 1980); *Dressler v. M.V. Sandpiper*, 331 F.2d 130,133 (2d Cir. 1964); *Yanitelli and Heller v. Navieras de Puerto Rico*, 103 FRD 413, (SDNY 1984) and 106 FRD 42,43 (SDNY 1985). Also see the same case, third opinion, 1985 West Law 440. *William v. Hertz and Heller*, 91 AD2d 548, 457 N.Y.S.2d 23, (1st Dept.) aff'd 59 NY2d 893, 465 NYS2d 937 (1982) *Bossone v. General Electric*, 144 AD2d 1044, 535 NYS2d 287 (1988); *Peros v. Cia De Nav.*, 75 Misc.2d 913, 349 NYS2d 926 (1973); *Wilkins v. American Export*, 46 AD2d 244, 362 N.Y.S.2d 168, Affd. 38 NY2d 758,381 NYS2d 51 (1975); *Heller v. Mutual Maritime*, 78 AD2d 786, 433 NYS2d 11 (1980). This course of conduct is exactly the sort of flouting of the courts that New York's CPLR 3126, not less than FRCP 37, is meant to deter. See *National Hockey League v. Metropolitan Hockey Club*, supra, 427 US at 643.

> The situation in *Hammond* was specifically distinguished from that in *Hovey v. Elliot*, 167 US 409, 42 L Ed 215, 17 S Ct 841 (1897), in which the Court held that it did violate due process for a court to take similar action as "punishment" for failure to obey an order to pay into the registry of the court a certain sum of money. Due process is violated only if the behavior of the defendant will not support the *Hammond Packing* presumption. A proper application of Rule 37(b)(2) will, as a matter of law, support such a presumption. See *Societe Internationale v. Rogers*, 357 US 197, 209-213, 2 L Ed 2d 1255, 78 S Ct 1087 (1958). If there is no abuse of discretion in the application of the Rule 37 sanction, as we find to be the case here (see Part III), then the sanction is nothing more

> than the invocation of a legal presumption, or what is the same thing, the finding of a constructive waiver.

Insurance Corp. of Ireland v. Compagnie Des Bauxites, supra, 465 US at 705-706.

Thus, absent an abuse of discretion, dismissal of a pleading for failure to cooperate in discovery is constitutionally sound as a matter of law. In the case at bar, the state courts have unanimously held that the trial court did not abuse its discretion. The Supreme Court of the United States, it is respectfully submitted, is not presented with a substantial federal question, when it is asked to review a trial court's exercise of discretion in a slip and fall case. The exhibits to this brief show, if such showing were needed, that the trial Court did not abuse its discretion.

For six years the petitioner was given the opportunity to obtain redress for his perceived injuries. That he failed to do so, due to his own intransigence or that of his counsel, may have prevented a hearing on the merits of the claim, but these events were not due to lack of due process, nor do they present a federal question worthy of scrutiny by this Court.

CONCLUSION

The petition should be dismissed.

Respectfully Submitted,

LAWLOR, CAULFIELD, GALVIN,
HELLER & HARRIS
Attorneys for Respondents
80 John Street
New York, New York 10038
(212) 493-6300

DAVID S. HELLER, ESQ.
OF COUNSEL

APPENDICES

SUPREME COURT OF STATE OF NEW YORK
COUNTY OF NEW YORK

MATE PICINIC,

Plaintiff,

– against –

SEATRAIN LINES, INC., ET AL.,

Defendant.

NOTICE TO TAKE DEPOSITION UPON
ORAL QUESTIONS AND TO PRODUCE

PLEASE TAKE NOTICE, that pursuant to Article 31, CPLR, the Deposition upon oral questions of the person(s) named will be taken as follows:

TO BE EXAMINED:	Plaintiff
DATE & TIME:	August 25, 1983, 10:00 A.M.
PLACE:	Supreme Court : New York County 60 Centre Street New York, New York 10007

PLEASE TAKE FURTHER NOTICE, that pursuant to Rule 3111, CPLR, each plaintiff and any co-defendant is required to produce the following items at the deposition:

(1) The motor vehicle report prepared by or on behalf of the witness.

(2) All medical bills and any receipts, cancelled checks or estimates relating to special damages.

(3) If lost earning are claimed, Federal and State Income Tax returns covering the year when loss claimed and two years prior thereto and one year after loss claimed.

(4) Any contracts, leases or documents relied upon with respect to the claim.

(5) Any statement given by or on behalf of any defendant serving this notice.

(6) Any and all exhibits, papers and/or documents relative to claim.

DATED: New York, New York
July 8, 1983

DOCKET # 830511 SEA
FILE # 111LRT898531J

McLAUGHLIN, SIMONE & LAWLOR
Attorneys for Defendant(s)
80 John Street
New York, New York 10038
Tel. No. (212) 668-9210
EBT's (212) 668-9270, 71, 72

To:

KENNETH HELLER, ESQ.
Attorney(s) for Plaintiff(s)
277 Broadway
New York, New York 10007

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

MATE PICINIC,

Plaintiff,

– against –

SEATRAIN LINES, INC., SEATRAIN REALTY, JACKSON TANKER CORPORATION,

Defendant.

Notice of Motion

Index No. 16200/83

SIRS:

PLEASE TAKE NOTICE, that upon the annexed affirmation of KENNETH HELLER, dated July 13, 1983 the exhibits annexed thereto and upon all the prior pleadings and proceedings heretofore had herein, the undersigned will move before this Court at the Supreme Courthouse, 60 Centre Street, New York, New York, at a Special Term Part 1A thereof, on August 8th, 1983 at 9:30 am or as soon thereafter as counsel can be heard for a protective order vacating defendants notice to take deposition upon oral questions and to produce, and for such other, further and different relief as to this Court may seem just and proper.

PLEASE TAKE FURTHER NOTICE, that pursuant to CPLR § 2214(b), sufficient notice having been given, opposing papers, if any, shall be served upon the undersigned at least five (5) days prior to the return date of this motion.

Dated: New York, New York
July 13, 1983

Yours, etc.

KENNETH HELLER
Attorney for Plaintiff
277 Broadway
New York, New York 10007

To: McLaughlin, Simone & Lawlor
Attorneys for Defendants
30 John Street
New York, New York 10038

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

MATE PICINIC,

Plaintiff,

– against –

SEATRAIN LINES, INC., SEATRAIN REALTY, JACKSON TANKER CORPORATION,

Index No. 16200/83

Defendant.

KENNETH HELLER, an attorney admitted to practice before the Courts of the State of New York, hereby affirms the following as true under penalties of perjury.

This affirmation is submitted in support of plaintiff's motion pursuant to CPLR § 3101 for a protective order vacating defendants notice to take deposition upon oral questions and to produce, and for other relief.

FACTS

This action is brought to recover money damages for a longshoreman-checker, severely injured on April 28, 1980, when he slipped and fell into a mud hole while checking containers located on property owned, operated and controlled by defendant herein. At the time of his accident, plaintiff was employed by UNITED TERMINALS, INC., at Port Seatrain, Weehawken, New Jersey.

Plaintiff, 36 years of age, has been totally disabled since the date of his accident.

On July 8, 1983, a notice to take deposition upon oral questions and to produce was served upon counsel for plaintiff, returnable August 25, 1983. Said notice is annexed hereto as Exhibit 1.

Plaintiffs demands that this notice to produce be vacated on the following grounds:

ITEM #1

This is not an automobile accident, therefore Item #1 is inept;

ITEM #2

This information is available from the compensation carrier and will be furnished to defendants once plaintiff has obtained it.

ITEM #3

Plaintiff's income and records are personal and are not to be disclosed to the defendant.

The plaintiff as a longshoreman, is not a paid employee but paid from a fund to which defendant, as a shipowner, is a contributor. The fund is called NYSA-ILA GAI FUND. The defendant being a member of this fund has available to it plaintiff's entire earnings records.

In view of the fact that an alternative means is present and the defendant has failed to exhaust these means to obtain these records this item should be stricken. Furthermore, defendants are not entitled to anything so privileged as income tax records.

ITEM #4

Plaintiff does not understand this demand

ITEM #5

This Item is incomprehensible

ITEM #6

Not only is this item incomprehensible it is an attack on the entire system of discovery being a "fishing expedition". Said item being over-broad places an undue burden upon the plaintiff and confronts the plaintiff with a task that he could not possibly accomplish.

The examination of the plaintiff by oral deposition can not take place until issues of the Items to be produced at the examination before trial has been disposed of. Further the areas of questioning with regard to the Items of discovery and inspection are objected to as being contrary to the civil rights of this plaintiff. The other areas of interrogation anticipated are objectionable within the confines of the Items demanded for discovery and inspection.

WHEREFORE, it is respectfully requested that defendant's notice to take deposition upon oral questions and to produce should be stricken in its entirety.

Dated: New York, New York
July 13, 1983

KENNETH HELLER

C-1

SUPREME COURT OF THE STATE OF NEW YORK,
SPECIAL TERM PART IA, NEW YORK COUNTY
at the Courthouse thereof, 60 Centre Street, New York,
New York 10007.

Present: Hon. DAVID H. EDWARDS, JR. Justice.

Picinic

– against –

Seatrain Lines

The following papers numbered 1 to ____ read on this motion
Argued & Submitted. PAPERS NUMBERED
No 80 on Calendar of Aug. 8, 1983
Notice of Motion - Order to Show Cause - and Affidavits Annexed
Answering Affidavit
Replying Affidavit
_____ Affidavit
_____ Affidavit
Pleadings - Exhibit
Stipulation - Referee's Report - Minutes
Filed Papers
Filed August 16, 1983
County Clerk's Office, New York

Upon the foregoing papers this motion by plaintiff to vacate notice of deposition is denied. Plaintiff shall appear for examination at special Term Part 2 of the court on August 22, 1983 at 10:00 a.m. and shall produce relevant records. Requests for rulings on objections shall be addressed to the justice presiding at special Term Part 2.

Dated Aug. 8, 1983 /s/

J.S.C.

NOTICE OF MOTION

Index No.: 16200/83
Judge: Blyn

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

MATE PICINIC,

Plaintiff,

– against –

SEATRAIN LINES, INC., SEATRAIN REALTY CORP. and JACKSON TANKER CORP.

Defendant.

MOTION BY:

Defendants, SEATRAIN LINES, INC., SEATRAIN REALTY CORP. and JACKSON TANKER CORP.

ACTION FOR:

Personal Injury

DATE AND TIME:

On Wednesday, June 17, 1987 at 2:00 P.M.

PLACE OF HEARING:

At the Courthouse located at 60 Centre Street, New York, N.Y. 10007 I.A.S. Part 26, Room 232

ORAL ARGUMENT REQUESTED:

YES [X] NO [ ]

SUPPORTING PAPERS:

Pleadings, exhibits and the Affirmation of Attorney JAMES J. FERETIC
Dated: May 29, 19

RELIEF DEMANDED:

A) An Order pursuant to CPLR 3104 and Uniform Rules § 202.12 for a Preliminary Conference and an Order directing plaintiff to comply with defendants' discovery demands.

B) Such other and further relief as this Court deems just and proper.

SEVEN DAY NOTICE:

Pursuant to CPLR 2214(b) answering papers are to be served at least 7 days prior to the return date of this motion.

Dated: New York, New York
May 29, 1987

CALENDAR NO. 73658 - INDEX NO.: 16200/83
PRESENT: HON. ETHEL B. DANZIG *Justice.*

New York Supreme Court
County of New York

MATE PICINIC,

Plaintiff,

– against –

SEATRAIN LINES, INC., et al.,

Defendants.

The following papers numbered 1 to ____
read on this motion _____
this _____ day of _____ 19____.

PAPERS NUMBERED

Notice of Motion and Affidavits Annexed
Order to Show Cause and Affidavits Annexed
Answering Affidavits
Replying Affidavits
Affidavits
Filed Papers (County Clerk's Office)
Others

Upon the foregoing papers this motion is granted to the extent of marking this case off the calendar until the pending appeal has been decided by the Appellate Division, First Department. The case may then be restored to the calendar by plaintiff on ten days written notice to the defendant and to the court.

That portion of the motion seeking discovery is denied without prejudice to renew in the proper Part after the appeal has been decided.

Dated May 22, 1985 /s/

J.S.C.

INDEX NO 16200/83

AFFIRMATION OF COMPLIANCE WITH SUPREME COURT RULE § 202.12(f)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------X

MATE PICINIC,

Plaintiff,

– against –

SEATRAIN LINES, INC., SEATRAIN REALTY CORPORATION, and JACKSON TANKER CORPORATION,

Defendants.

----------X

KENNETH HELLER, an attorney at law in the State of New York, under penalty of perjury, hereby affirms:

That he is the attorney for the plaintiff, that he is familiar with the facts herein, and that he files this Affirmation of Compliance with Supreme Court Rule § 202.12(f) in order to file the Note of Issue in this case.

This case was previously on the trial calendar under Calendar number 73658, against defendant Jackson Tanker Corporation, only, upon its default.

Said default was vacated by the Appellate Division, First Department, in an order dated February 4, 1986, and defendant Jackson Tanker served its answer.

On May 19, 1986, affirmant served a Request for Preliminary Conference upon defendants' attorneys. The case was assigned, but no preliminary conference has been held.

There are no outstanding orders resulting from any preliminary conference to date, as a result of the recent assignment.

WHEREFORE, it is respectfully requested that plaintiff be permitted to file his Note of Issue and Statement of Readiness.

Affirmed this 18th day
of June, 1986 /s/ Kenneth Heller

KENNETH HELLER

NOTE OF ISSUE

INDEX NO 16200/83

Name of Judge: BLYN

SUPREME COURT, NEW YORK COUNTY, N.Y.

MATE PICINIC,

Plaintiff(s)

– against –

SEATRAIN LINES, INC., SEATRAIN REALTY CORPORATION, and JACKSON TANKER CORPORATION,

Defendant(s)

NOTICE FOR TRIAL

☒ Trial by jury demanded
  ☒ Of all issues
  ☐ Of issues specified below or attached hereto
☐ Trial without jury

Filed by attorney for Plaintiff
Dated summons served April 20, 1983
Date service completed April 20, 1983
Date issue joined June 23, 1983 and Feb. 27, 1986

NATURE OF ACTION OR SPECIAL PROCEEDING

☒ Tort:
  ☐ Motor vehicle negligence
  ☐ Medical malpractice
  ☒ Other tort - Negligence
☐ Contract
☐ Contested matrimonial
☐ Uncontested matrimonial

☐ Tax certiorari
☐ Condemnation
☐ Other (not itemized above) specify _____
☐ This action is brought as a class action
☐ This is a medical malpractice action: panel procedures prescribed by court rules pursuant to Jud. § 148.a.
☐ have been completed ☐ have not been completed
Amount demanded $10,000,000.00
Other relief _____
Insurance carrier(s), if known: Travelers

Attorney(s) for Plaintiff(s)	KENNETH HELLER, Esq.
Office & P.O. Address:	335 Broadway New York, New York 10013
Phone No.:	(212) 962-6085
Attorney(s) for Defendant(s)	Law Office of Raymond G. Lawlor
Office & P.O. Box Address:	80 John Street New York, New York 10038
Phone No.:	(212) 668-9210

NOTE: Clerk will not accept this note of issue unless accompanied by a certificate of readiness, or, in a medical malpractice action, unless, where applicable, the certificate of readiness previously has been filed and the panel procedure prescribed by court rules pursuant to section 148-a of the Judiciary Law have been completed.

CERTIFICATE OF READINESS FOR TRIAL
(Items 1-7 must be checked)

	Completed	Waived	Not required
1. All pleadings served	X		
2. Bill of particulars served			X
3. Physical examinations completed			X
4. Medical reports exchanged			X
5. Appraisal reports exchanged			X
6. Compliance with the Rules in matrimonial actions (22 NYCRR 202.16)			X
7. Discovery proceedings now known to be necessary completed			X

8. There are no outstanding requests for discovery.
9. There has been a reasonable opportunity to complete the foregoing proceedings.
10. There has been compliance with any order issued pursuant to the Precalendar Rules (22 NYCRR 202.12).
11. If a medical malpractice action, there has been compliance with any order issued pursuant to 22 NYCRR 202.56.
12. The case is ready for trial.

Date: June 17, 1986 /s/ Kenneth Heller

KENNETH HELLER, ESQ.

Attorney(s) for Plaintiff
Office & P.O. Address 335 Broadway
New York City, N.Y. 10013

State of New York, County of New York ss: Lily Choung being duly sworn, deposes and says that deponent is not a party to the action is over 18 years of age and resides at New York, New York, on the 17th day of June 1986
Deponent served the within note of issue and certificate of readiness on Law Office of Raymond G. Lawlor attorney(s) for Defendant herein at his office at: 80 John Street, New York, NY during his absence from said office
(a) by then and there leaving a true copy of the same with his clerk: partner: person having charge of said office.
(b) and said office being closed, by depositing a true copy of same, enclosed in a sealed wrapper directed to said attorney(s), in the office letter drop or box.
Sworn to before me on June 1986

Present: Hon. ARTHUR E. BLYN

Mate Picinic

— against —

Seatrain Lines

The following papers numbered 1 to ____ read on this motion

PAPERS NUMBERED

No ____ on Calendar of _____

Notice of Motion - Order to Show Cause - and Affidavits Annexed

Answering Affidavit

Replying Affidavit

_____ Affidavit

_____ Affidavit

Pleadings - Exhibit

Stipulation - Referee's Report - Minutes

Filed Papers

Upon the foregoing papers this motion to strike the note of issue is granted, in accordance with the recommendation of the Special Master annexed hereto.

Settle order.

Dated 12/16/86 /s/

J.S.C.

Briefs: Plaintiff's ___ Defendant's ____ Petitioner's ____
Respondent's ____ Relator's ____
Briefs _____

County Clerk's No 16200, 1983
Speci I Liber _____ Line 001, 19____

Special Master BYRON DRESNER

Date: 12/10/86

Motion Calendar No. _____(Cross Motion: Yes ____ No ✓__

Relief Requested: (Motion) To Strike Note of Issue
(Cross motion) _____

Personal ✓__ Telephone ____ Conference with Pltf.

Personal ✓__ Telephone ____ Conference with Deft.

Motion Submitted Without Conference ✓_____

Disposition:

Motion adjourned ____ (Date: _____)
Motion withdrawn ____ Cross motion withdrawn ____
Motion settled ____ Cross motion settled ____
Stipulation on record _____
Stipulation to be submitted _____
Motion submitted to Special Term Part I without recommendation _____

Recommendation:

Motion granted ✓__ Cross motion granted ____
Motion denied ____ Cross motion denied ____ Other: ____

Comments:

The motion to strike note of issue should be granted. No preliminary conference was held prior to the filing of the note of issue dated 6/17/86 although a demand for a preliminary conference was made by the plaintiff on 5/19/86. Issue was not joined as to Def. Jackson Tanker Corp. until Feb. 27, 1986 after a stay been in effect until the

App. Div. decision Feb. 4, 1986. The case had been marked off the Calendar as a previous note of issue filed on Mar. 12, 1985, to be restored on 10 days notice with the pending appeal to the App. Division was decided. The defs. has not had a reasonable opportunity to depose the Plaintiff contary to the Certificate of Readiness. There is evidence of Pre-Trial Order by the Court under the Rules of this Court.

The case should be set down for a Preliminary Conference.

/s/Byron Dresner

Special Master

NOTICE OF MOTION

Index No.: 16200/83
Judge: Blyn

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

MATE PICINIC,

Plaintiff,

– against –

SEATRAIN LINES, INC., SEATRAIN REALTY CORP. and JACKSON TANKER CORP.

Defendant.

MOTION BY: Defendants, SEATRAIN LINES, INC., SEATRAIN REALTY CORP. and JACKSON TANKER CORP.

ACTION FOR: Personal Injury

DATE AND TIME: On Wednesday, June 17, 1987 at 2:00 P.M.

PLACE OF HEARING: At the Courthouse located at 60 Centre Street, New York, N.Y. 10007 I.A.S. Part 26, Room 232

ORAL ARGUMENT REQUESTED: Yes

SUPPORTING PAPERS: Pleadings, exhibits and the Affirmation of Attorneys JAMES J. FERETIC Dated: May 29, 1987

RELIEF DEMANDED:

A) An Order pursuant to CPLR 3104 and Uniform Rules § 202.12 for a Preliminary Conference and an Order directing plaintiff to comply with defendants' discovery demands.

B) Such other and further relief as this Court deems just and proper.

SEVEN DAY NOTICE: Pursuant to CPLR 2214(b) answering papers are to be served at least 7 days prior to the return date of this motion

Dated: New York, New York
May 29, 1987

LAWLOR & CAULFIELD
Attorneys for Defendants
SEATRAIN LINES, INC.,
SEATRAIN REALTY CORP. and
JACKSON TANKER CORP.
Office & P.O. Address
80 John Street
New York, New York 10038
Tel. No. (212) 668-9210

TO: KENNETH HELLER, ESQ.
Attorney for Plaintiff
335 Broadway, Suite 613-14
New York, New York 10007
(212) 962-6085

GH:mj
830511
OPIDO89

AFFIRMATION OF JAMES J. FERETIC, ESQ.
IN SUPPORT OF MOTION DATED MAY 29, 1987

AFFIRMATION

Index No. 16200/83
Judge: Blyn

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

MATE PICINIC,

Plaintiff,

– against –

SEATRAIN LINES, INC., SEATRAIN REALTY CORP. and JACKSON TANKER CORP.,

Defendants.

JAMES J. FERETIC, an attorney duly licensed to practice law before the Courts of the State of New York, affirms the following under the penalties for perjury pursuant to CPLR 2106:

That I am associated with LAWLOR & CAULFIELD, attorneys for defendants. As the attorney assigned to the above referenced matter, I am thoroughly familiar with the facts and circumstances of this case.

This is an action for personal injuries, alleged to have arisen from a trip and fall.

The motion herein is for the scheduling of a pre-trial conference, at which the aid of the Court will be sought in supervising discovery. Defendants wish to obtain the exchange of complete medical records, to schedule and conduct an oral

examination before trial, and physical and psychological examinations of plaintiff. A complete exchange of medical records has not occurred. Neither a deposition nor a physical examination of plaintiff has been conducted heretofore. On information and belief, plaintiff does not speak the English language. Therefore, defendants additionally request that the specific dialect of the plaintiff be disclosed, with sufficient notice to afford defendants time to engage an interpreter prior to the time of deposition.

I. MEDICAL RECORDS

Demand was made by defendants for the exchange of medical records on February 20, 1986 (Exhibit A). No records were provided by plaintiff in response thereto, until March 11, 1987. At that time a defaced copy was provided by plaintiff, with a notice of availability for medical examination on April 1, 1987 (Exhibit B). Defendants duly objected to this inadequacy by letter to plaintiff's counsel (Exhibit C). Legible, but incomplete copies of plaintiff's medical records were received in this office from plaintiff's physician, Dr. Margolies, on April 8, 1987 (Exhibit D). By letter to plaintiff's counsel, a procedure was suggested for effecting the discovery necessary to prepare this case for trial (Exhibit E). No response by plaintiff has been forth coming.

A review of the medical records obtained reveals that plaintiff was examined by several doctors other than the single physician for which an authorization to obtain medical records was provided.

A list of such physicians, along which the dates wherein they are listed in the records of Dr. Margolie are as follows. (A copy of the records provided by Dr. Margolies is appended as Exhibit F.)

5-1-80	X-rays taken by Dr. A. Wasserman, radiologist at J.C., N.J.
10-15-80	An unnamed medical examiner disagreed with the course of treatment.

10-28-80	Orthopedic examination by Dr. Allegra.
12-9-80	Unnamed federal examiner disagreed with course of treatment.
1-22-81	Phone conversation with Dr. Allegra's office.
1-29-81	Letter sent to unnamed parties with copy of Dr. Allegra's report.
2-3-81	Dr. Goodgold performed EMG at N.Y.U. Medical School.
2-10-81	Findings by Dr. Goodgold.
9-17-81	CT Scan at Computed Tomography Center, Rego Park performed on 7-29-81.
9-30-81	Report noted of Dr. Blackwell (?).
11-10-81	Examined by Labor Department orthopedist, Dr. James Halligus.
3-25-82	Consultation with Dr. Blackwell on neuropsychiatric matter.

The records provided by Dr. Margolies are themselves incomplete. Neither copies of reports of other doctors, apparently received by him, were included nor was the letter he sent to "all parties concerned" on January 29, 1981. The records are, evidently, in the form of sequentially numbered index cards. No copy of Card "7" was provided. On the front of Card "8" there is a large portion which has been obliterated on the photocopy itself. The back of Card "9" and the front of Card "10" were not photocopied and submitted to our office. Moreover, a portion of the back of Card "10" was obscured by a piece of paper stapled to the card before photocopying.

It is quite clear that plaintiff has been less than forthcoming in the provision of medical records for which demand was duly made. The information necessary, even on which to make specific demand for authorizations, is exclusively in the possession of plaintiff. It is clear that at least nine and possibly more physicians have been seen by plaintiff with respect to injuries claimed in this action. Plaintiff has thus far acknowledged only one, for which defendants still do not have complete records. The defendants therefore request the Court's assistance in obtaining complete medical records.

II. EXAMINATION BEFORE TRIAL

Plaintiff was noticed by defendants for a deposition on July 8, 1983 (Exhibit G). Defendant moved for a protective order vacating the notice. Justice Edwards denied it in its entirety. (Exhibit H) Plaintiff moved to reargue, yet failed to appear on the scheduled date. At that time defendant Jackson Tanker was appealing a default judgment entered against it. Plaintiff moved to stay all proceedings in the action against the remaining defendants Plaintiff theorized that defendant Jackson Tanker was entitled to no discovery in an inquest on damages and that allowing the remaining defendants to continue discovery would provide information to Jackson Tanker. A stay of all proceedings was granted pending the outcome of the appeal. (See Affirmation of attorney John R. Seybert dated April 17, 1985 and Orders of Justice Danzig dated April 22, 1985, and of Justice Wright dated August 20, 1985, and October 14, 1985, appended as Exhibit I.)

Parallel to the above proceedings, plaintiff's counsel appeared before Judge Ryan, of the Bankruptcy Court for the Southern District of New York, to petition for a lifting of the bar order as against defendants Seatrain Lines and Seatrain Realty. Both were in Chapter 11 proceedings. Judge Ryan requested that plaintiff be produced for examination of the issue of excusable neglect of the bar order. Plaintiff's counsel refused to do so. (See minutes for January 27, 1984, and March 2, 1984, appended as Exhibit J.)

On February 4, 1986, the default judgment against defendant Jackson Tanker was vacated by the Appellate Division First Department (497 N.Y.S.2d 924).

On May 19, 1986, plaintiff requested a preliminary conference. Without such conference being held, on June 18, 1986, plaintiff requested this Court's permission to file his Note of Issue, affirming that a bill of particulars, physical examination, exchange of medical reports and other discovery proceedings were not required (Exhibit K). On June 26, 1986, plaintiff served a bill of particulars (Exhibit L). Defendants opposed filing the Note of Issue and, after several adjournments, this Court granted defendants' motion, accepting the recommendation of Special Master Byron Dresner (Exhibit M). Part of that recommendation was that a preliminary conference be held.

On December 19, 1986, in a telephone conversation between Susan Herman, Esq., of Mr. Heller's office, and myself and David Heller, of this office, depositions of all parties were scheduled for January 14, 1987. Plaintiff's counsel agreed to provide this office with the name of the language spoken by plaintiff. Said information was not provided. The depositions were adjourned without date.

It is quite clear from the long history of this case that plaintiff's counsel has no intention of voluntarily producing the plaintiff for deposition at any time or place. If any deposition is to occur, defendants respectfully submit, it will only be by Order of this Court for a time and date certain in a room of this Courthouse.

III. MEDICAL EXAMINATION

In paragraph "6" of plaintiff's bill of particulars (Exhibit L), it is claimed that "plaintiff sustained an injury to his entire body. . . ." Generalities are provided for particular injuries only as "[a]mong the injuries sustained. . . ." In addition to physical injuries there is a claim of "post-traumatic neurosis in the form of neurotic depression with anxiety. . ." Defendants could not

possibly have knowledge as to the type of physical examination necessary nor whether a psychological examination is also warranted. The bill was received more than three years following commencement of this suit. No medical records were provided by plaintiff until this year. As detailed above, the exchange must be completed and a deposition of plaintiff conducted before any physical examination would have a basis on which to provide a meaningful evaluation.

On the basis of the events herein, it would be naive to believe that the plaintiff will be produced for examination except under an Order by this Court. Defendants therefore desire that a schedule for completion of discovery be fixed by this Court, which will include dates certain for a physical and psychological examination of the plaintiff. The latter may be waived if counsel will stipulate on the record that psychological injuries are not claimed.

CONCLUSION

This action has a history of time consuming motions and appeals. The only results have been delays and increased costs to plaintiff, defendants and the Court. After nearly four years of litigation, and nearly seven years after the date of the alleged injuries, defendants still lack any meaningful knowledge of the basis of plaintiff's claim. Plaintiff is no nearer a trial on his claim. The lack of cooperation evinced by plaintiff's counsel is the sole cause of this delay. Defendants are eager and willing to proceed to trial in an orderly fashion. However, it has become clear that this is not possible without the intervention of this Court.

Wherefore, defendants respectfully request that this Court issue an Order directing plaintiff to provide an exchange of all medical records and/or authorizations whereby defendants may obtain such records; that after allowing a reasonable time for the foregoing that plaintiff be ordered to appear for a deposition on a date to be fixed by this Court which shall not be adjourned in a room in this Courthouse with ample notice given prior thereto of the language spoken by plaintiff; that plaintiff

be ordered to appear on date(s) to be fixed by this Court which shall not be adjourned for physical and psychological examinations; and for such other and further relief as this Court may deem just and proper.

Dated: New York, New York
May 29, 1987

JAMES J. FERETIC

INDEX NO 16200/83

NOTICE OF CROSS-MOTION TO PRECLUDE AND TERMINATE DISCOVERY

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------X

MATE PICINIC,

Plaintiff,

– against –

SEATRAIN LINES, INC., SEATRAIN REALTY CORP., and JACKSON TANKER CORP.,

Defendants.

----------X

SIRS:

PLEASE TAKE NOTICE that upon the annexed Affirmation of Kenneth Heller, Esq., affirmed the 1st day of September, 1987, upon the annexed exhibits and upon all the previous pleadings and proceedings heretofore had herein, the undersigned will cross-move before this Court at the Supreme Courthouse, 60 Centre Street, New York, New York 10007, before Justice Arthur Blyn, Room 212, on the 9th day of September, 1987, at 2:00 PM in the afternoon, or as soon thereafter as counsel can be heard, for an Order striking all defendants' discovery demands, terminating discovery in this action, and granting such other, further, and different relief as this Court deems just and proper.

Dated: September 1, 1987
New York, New York

Yours, etc.

KENNETH HELLER, ESQ.
Attorney for Plaintiff
335 Broadway, Room 614
New York, New York 10013
212-962-6085

To: LAWLOR & CAULFIELD
Attorneys for Defendants
80 John Street
New York, New York 10038
212-668-9210

INDEX NO. 16200/83

AFFIRMATION IN SUPPORT OF NOTICE OF CROSS-MOTION TO PRECLUDE AND TERMINATE DISCOVERY AND IN OPPOSITION TO DEFENDANTS' MOTION FOR PRELIMINARY CONFERENCE AND DISCOVERY

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------X

MATE PICINIC,

Plaintiff,

– against –

SEATRAIN LINES, INC., SEATRAIN REALTY CORP., and JACKSON TANKER CORP.,

Defendants.

----------X

KENNETH HELLER, an attorney-at-law in the State of New York, under penalty of perjury, hereby affirms the following:

That he is the attorney for the plaintiff, that he is familiar with the facts herein and all previous pleadings and proceedings, and that he submits this Affirmation in Support of Plaintiff's Cross-Motion to Strike all pending defendants' discovery demands, to preclude defendants from further discovery in this action, to terminate all discovery by defendants in this action, and for other relief. Plaintiff submits this Affirmation in Opposition to Defendants' Motion for a Preliminary Conference and for an Order directing plaintiff to comply with defendants' discovery demands.

Defendants, at this late date, following service of a Notice of Availability with an enclosed authorization of the only treating physician who has treated the plaintiff, seek to cast aside the rules of this Court, 22 NYCRR Sec. 202.17 and CPLR Sec. 3121; and having defaulted in compliance with the Notice of Availability; having defaulted in making any application to strike the Notice of Availability; having defaulted in objecting to the Notice of Availability; and otherwise having flaunted the rule requiring compliance with a Notice of Availability, now seek to completely avoid their multiple defaults, and request that this Court set aside all that has occurred prior thereto and grant them permission to subject the plaintiff to a physical examination and to obtain the records of treating doctors, who are not available in this jurisdiction.

The defendants herein are past masters at extricating themselves from defaults. These defendants have exercised their only ability, in this case: The ability to extricate themselves from a common strand of constant defaults:

1. They have defaulted in answering the Complaint, which occasioned the Orders of Judge Wright and an Appeal.

2. They have defaulted on several occasions in answering the Note of Issue, which occasioned several motions to this Court that still have not been concluded.

3. For the third time, they have exhibited their only consistency – an additional default.

This Court should be overly fatigued at continuing to rescue defendants from the defaults.

A Notice of Availability with the annexed authorization was served upon them (Exhibit #1).

Defendant's Motion, that was brought on returnable June 17, 1987, was long after the period required to respond to the Notice

of Availability. It appears that the defendant finally realized they had defaulted in this case for the third time.

There should be a limit to this Court's patience in rescuing inept and incompetent defendants.

LAW

Defendants' abject failure to move or to obtain a stipulation to change the date of the Notice of Availability is an absolute waiver of the right to a physical examination of the plaintiff, pursuant to the provisions of 22 NYCRR Sec. 202.17(a).

The rule in the First Department is espoused by the Appellate Division in *Palmieri v. Romat Realty Corporation et al.*, 45 Ad2d 948 (1st Dept 1974), at p. 949:

> This argument is of no avail. Plaintiffs served a notice of availability for physical examination on January 20, 1971, over one year prior to the action having been stricken from the calendar. Subdivision (a) of section 660.11 of the rules of the Supreme Court (22 NYCRR 660.11[a]) requires that the examination be held not later than 30 nor more than 40 days after service, absent a stipulation. No stipulation having been entered into, defendants are deemed to have waived the examination (see *Delgado v. Fogle*, 32 AD2d 85). Concur—Markewich, J.P., Murphy, Lupiano, Tilzer & Lane, JJ.

The Second Department rule, identical to our own, in *Delgado v. Fogle*, 32 AD2d 85 (2 Dept 1969), states that there is an affirmative duty and obligation on the defendant to react; and a failure to respond, either by motion or by obtaining a stipulation, is a waiver of all rights to obtain a physical examination.

In *Delgado*, at pp. 86-87, the Court stated:

> Neither the defendants' attorneys nor the physician they designated appeared to conduct the examination at the time and place specified in the plaintiffs' notice. By notice of motion dated May 17, 1968, the defendants moved for an order directing the plaintiffs to submit to a physical examination. The motion was granted and the plaintiffs appealed. . . . ***Rule I is clear in terms and casts an affirmative duty upon a defendant served with a notice pursuant thereto either to proceed with the examination at the time and place specified in the notice or, in the alternative, to move to modify or vacate the notice within five days after receipt. The recipient of such a notice is neither free to ignore it with impunity nor free to treat it as nothing more than a suggested date.*** (Emphasis added.)
>
> Accordingly, if, at the time of receipt of the notice, it appears to the recipient that the time or place specified therein is not mutually convenient, the recipient *must* move, in accordance with rule I, for a modification of the notice, unless, of course, the parties stipulate to an adjourned date. In the absence of such a modification or stipulation, a ***defendant who fails to proceed in accordance with the notice is in default and will be deemed to have waived the right to conduct such a physical examination in the future.*** Such a defendant may be relieved of the default only upon demonstrating the existence of a reasonable excuse therefor. (Emphasis added.)

In 1981, in *Dingee v. Dominick*, 85 AD2d 593 (2 Dept 1981), *Delgado* was again affirmed:

> Having failed to properly respond to two notices of availability for physical examination, served by plaintiffs in January and July, 1979, pursuant to 22 NYCRR

> 672.1, or to request such examination in October, 1979, when plaintiffs served a supplemental bill of particulars mentioning additional injuries, and instead seeking to examine the injured plaintiff only after plaintiffs served their note of issue and statement of readiness in July, 1980, ***defendants have waived their right to a physical examination*** (see 22 NYCRR 672.1; 672.7; *Delgado v. Fogle*, 32 Ad2d 85; *Juett v. Paesani*, 19 AD2d 726). (Emphasis added.)

In 1983, in *DeChiaro v. Rendell*, 95 AD2d 792 (2 Dept 1983), the court continued to uphold the Notice of Availability rule cited in *Delgado:*

> Section 672.1 of the rules of this court (22 NYCRR 672.1) requires that a notice of availability for a physical examination be responded to within five days of service. This court has held that, absent a reasonable excuse, noncompliance by a defendant with this rule will effectively ***waive that defendant's right to a physical examination of the injured plaintiff*** (*Delgado v. Fogle*, 32 AD2d 85). (Emphasis added.)

The constant thread woven throughout the fabric of all of the authorities cited in support of this Cross-Motion to Strike Defendant's Demand for Physical Examination, is that the abject failure of the defendant to respond to the notice of medical availability resulted in the Court's finding that the defendant had waived their right to a physical examination.

Similarly, it is anticipated that this defendant will attempt to offer some lame excuse, but this Court should grow fatigued over persistent excuses as a vehicle to overcome default.

This Court should no longer pull defendant's overdone chestnuts out of the fire.

Defendant seeks to ramble all over the State of New Jersey to obtain records of *examining physicians* whom plaintiff will not

call at the trial. The authorities are clear and direct. When plaintiff commits himself not to call an examining physician, then there is no obligation to furnish authorizations to anyone to compel the production of reports which cannot be introduced at trial.

In the case of *Vaupel v. Church Charity Foundation of Long Island*, 49 AD2d 932 (2 Dept 1975), the Court specifically discussed the identical fact pattern:

> Pursuant to a previous order, plaintiffs have already submitted to this defendant the report of the only physician that plaintiffs intend to call at the trial in support of the claim for psychiatric injuries. Our rules of practice provide that "no party shall be permitted to offer any evidence of injuries or conditions not set forth or put in issue in the respective medical reports previously exchanged, nor will the court hear the testimony of any physician whose medical reports have not been served." (22 NYCRR 672.8). Although plaintiffs consulted other physicians, the reports of those physicians were not furnished to this defendant. Consequently, as a penalty for the failure to furnish the reports of the additional treating physicians, plaintiffs are precluded from utilizing their testimony, or the results of their examinations, at the trial. We think this penalty is sufficient to insure a proper disclosure, and results in a fair balance of the interests of plaintiffs and this defendant.

THIS COURT HAS THE OBLIGATION TO PROTECT THE RIGHTS OF A MARITIME WORKER

This plaintiff, being a maritime worker, is considered entitled to be protected as a ward of admiralty. See *Harden v. Gordon*, F. Cas. No. 6,047 (CC Me 1823), page 480 at 482:

> Seamen are by the peculiarity of their lives liable to sudden sickness from change of climate, exposure to

perils, and exhausting labour. They are generally poor and friendless, and acquire habits of gross indulgence, carelessness, and improvidence. If some provision be not made for them in sickness at the expense of the ship, they must often in foreign ports suffer the accumulated evils of disease, and poverty, and sometimes perish from the want of suitable nourishment. Their common earnings in many instances are wholly inadequate to provide for the expenses of sickness; and if liable to be so applied, the great motives for good behavior might be ordinarily taken away by pledging their future as well as past wages for the redemption of the debt. In many voyages, particularly those to the West Indies, the whole wages are often insufficient to meet the expenses occasioned by the perilous diseases of those insalubrious climates. On the other hand, if these expenses are a charge upon the ship, the interest of the owner will be immediately connected with that of the seamen. The master will watch over their health with vigilance and fidelity. He will take the best methods, as well to prevent diseases, as to ensure a speedy recovery from them. He will never be tempted to abandon the sick to their forlorn fate; but his duty, combining with the interest of his owner, will lead him to succor their distress, and shed a cheering kindness over the anxious hours of suffering and despondency. Beyond this, is the great public policy of preserving this important class of citizens for the commercial service and maritime defence of the nation. Every act of legislation which secures their healths, increases their comforts, and administers to their infirmities, binds them more strongly to their country; and the parental law, which relieves them in sickness by fastening their interests to the ship, is as wise in policy, as it is just in obligation. Even the merchant himself derives an ultimate benefit from what may seem at first an onerous charge. It encourages seamen to engage in perilous voyages with more promptitude, and at lower wages. It diminishes

> the temptation to plunderage upon the approach of sickness; and urges the seamen to encounter hazards in the ship's service, from which they might otherwise be disposed to withdraw. It would therefore be a matter of regret to find incorporated into the common law a doctrine at variance with that, which seems so generally to have received the approbation of continental Europe. No evidence of such a variance is produced; and I am not bold enough to desert the steady light of maritime jurisprudence for the more doubtful guide of general reasoning.

ALL MARITIME WORKERS ARE PROTECTED BY THE AUTHORITY OF HARDIN V. GORDEN

In *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, at p. 90:

> Petitioner insists, however, that the obligation flows from, and is circumscribed by the existence of, the contract between the owner of the vessel and the seaman. Accordingly, since there was no such contract here, it says respondent cannot recover. Respondent is equally insistent that the owner cannot slough off liability to those who do the vessel's work by bringing an intermediary contracting employer between himself and those workers. In respondent's view the liability is an incident of the maritime service rendered, not merely of the immediate contractual relation of employment, and has its roots in the risks that service places upon maritime workers and in the policy of the law to secure them indemnity against such hazards.

This Court has an obligation finally to protect this maritime worker.

Annexed is a list of defendants' defaults (Exhibits #2).

WHEREFORE, it is respectfully requested that this Court grant plaintiff's Cross-Motion in all respects, deny defendants' Motion in all respects, and grant such other, further, and different relief as this Court deems just and proper.

Affirmed this 1st
day of September, 1987

KENNETH HELLER

PRELIMINARY CONFERENCE ORDER
PURSUANT TO PART 202 OF THE UNIFORM CIVIL RULES
FOR THE SUPREME COURT
NEW YORK COUNTY

INDIVIDUAL ASSIGNMENT PART 26

PICINIC

PLAINTIFF(S)

AGAINST

SEATRAIN LINES

DEFENDANT(S)

INDEX NUMBER 16200/83

CONFERENCE NUMBER

CONFERENCE DATE 12/1/87

APPEARANCES

PLAINTIFF(S) K. HELLER

DEFENDANT(S) JJ. McGRATH

I. INSURANCE COVERAGE:

Travelers - 500,000

F illegible 1,000,000

II. BILL OF PARTICULARS:

4. BILL OF PARTICULARS FOR AFFIRMATIVE DEFENSES TO BE SERVED. SUBMITTED.

III. MEDICAL REPORTS AND HOSPITAL AUTHORIZATIONS:

1. FURNISHED EXCEPT FOR CAT SCAN

AUTHORIZATION TO BE PRODUCED BY PLAINTIFF FOR CAT SCAN TAKEN 7/20/81 BY COMPUTED TOMOGRAPHY CENTER, REGO PARK, NY, FOR DR. TURGOLD ENG 7/2/81 TO BE SERVED WITHIN 45 DAYS.

IV. PHYSICAL EXAMINATION: (OTHER THAN TRANSIT)

1(C) EXAMINATION OF PLAINTIFF TO BE HELD WITHIN 45 DAYS OF PLAINTIFF'S EBT EXAM. BY ORTHOPEDIST AT DEFENDANT'S OFFICE EXAM BY NEUROLOGIST AND PSYCHIATRIST TO TAKE PLACE AT PLAINTIFF'S ATTORNEY'S OFFICE.

2(B). COPY OF PHYSICIAN'S REPORT TO BE FURNISHED TO PLAINTIFF WITHIN 30 DAYS OF EXAMINATION.

EXAMINATION BEFORE TRIAL:

1. PLAINTIFF DEFENDANTS

2. TO BE HELD ON FEBRUARY 10, 1988 AT 10:00 A.M. COURTHOUSE AT 60 CENTRE STREET. DEFENDANT TO FOLLOW PLAINTIFF DEFENDANT TO PRODUCE PERSON WITH KNOWLEDGE OF FACTS.

OTHER DISCLOSURE:

4. ALL PARTIES RESERVE RIGHT TO SERVE NOTICE OF DISCOVERY AND INSPECTION AND DEMAND FOR AUTHORIZATION.

5. TO BE COMPLETED

IMPLEADER ACTIONS:

1(B) TO BE COMPLETED WITHIN 60 DAYS AFTER COMPLETION OF EBT'S

PREFERENCES:

(A) 3403(A) – CPLR GRANTED

ADDITIONAL DIRECTIVES:

2. SEE ATTACHED PAGE FOR ADDITIONAL DIRECTIVES.

PLAINTIFF IS DIRECTED TO FILE A NOTE OF ISSUE ON OR BEFORE JULY 31, 1988.

WHEN FILING THE NOTE OF ISSUE AND CERTIFICATE OF READINESS THE FILING PARTY SHALL SERVE A COPY OF THE ORDER, TOGETHER WITH AN AFFIRMATION STATING COMPLIANCE WITH ALL DIRECTIVES OF THIS ORDER AND AFFIDAVIT OF SERVICE ON THE TRIAL CLERK (ROOM 158) AND ALL PARTIES IN THE EVENT OF NON-COMPLIANCE THIS OR OTHER SANCTIONS MAY BE IMPOSED.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT

DATED: 12/1/88

ENTER: /s/ _____
J.S.C.

ADDITIONAL DIRECTIVES: THIS ORDER IS NOT ENTERED BY STIPULATION AND IS OVER THE OBJECTION OF PLAINTIFF'S COUNSEL. THE PARTIES HAVE THE RIGHT TO TAKE AN APPEAL FROM THIS ORDER.

/s/ _____
J.S.C.

ORDER DATED AUGUST 31, 1989

At a term of the Appellate Division of the Supreme Court herein and for the First Judicial Department in the County of New York, on August 31, 1989

Present: Hon. John Carro Justice Presiding
Sidney H. Asch
Richard H. Wallach
Israel Rubin Justices

Mate Picinic,

Plaintiff-Appellant,

against

Seatrain Lines, Inc., Seatrain Realty Corp., and Jackson Tanker Corp., M-3532

Defendants-Respondents.

Defendants-respondents having moved this Court for an order dismissing plaintiff's appeals from an order of the Supreme Court, New York County, entered on December 3, 1987, and from an order of said court entered on June 6, 1988,

Now, upon reading and filing the papers with respect to the motion, and due deliberation having been had thereon,

It is ordered that the motion to dismiss plaintiff's appeals be and hereby is granted, with $100 costs.

ENTER:

FRANCIS X. GALDI

Clerk

SUPREME COURT : NEW YORK COUNTY
CIVIL TERM
IAS : PART 30

MATE PICNIC,

Plaintiff,

— against —

SEATRAIN LINES, INC., SEATRAIN REALTY CORPORATION AND JACKSON TANKER CORPORATION,

Defendants.

Index No. 16200/83

HELEN E. FREEDMAN, J.:

Plaintiff and defendants move and cross move alternatively to strike each other's pleadings pursuant to CPLR §3126(3) for failure to comply with court orders.

This is an action for personal injuries allegedly sustained by the plaintiff, a longshoreman, while unloading cargo on defendants' property in April 1980. Since the action was commenced in 1983, virtually no discovery has taken place. Prior to 1987, motion practice by both sides and the bankruptcy by one of the defendants delayed discovery.

In a December 1987 preliminary conference, Justice Arthur Blyn ordered plaintiff to supply CT Scans, appear for physical and psychiatric examinations and submit to examinations before trial. Pursuant to this order, discovery was to be completed within sixty (60) days and a note of issue filed by July 31, 1988. Plaintiff's attorney served a notice for the EBT, but did not agree to arrange for an interpreter familiar with plaintiff's Yugoslavian dialect. Since the EBT could not be conducted without such

an interpreter, it was never held. Each time defendants suggested the name of an employee to ask to appear for a deposition, plaintiff rejected the employee as unsuitable. When defendants did not agree to plaintiff's unilateral offer to appear for a physical examination prior to the EBTs, plaintiff deemed the physical examination waived.

After Justice Blyn's retirement, the case was reassigned to this Court which granted plaintiff a stay of discovery until September 1, 1988 so that plaintiff could perfect his appeal of Justice Blyn's order. Plaintiff then made a recusal motion which was denied and subsequently appealed. Neither the appeal of Justice Blyn's order nor the appeal of the recusal motion was ever perfected and to date, discovery remains at a standstill.[1]

Section 3126(3) of the CPLR provides in part that if a party refuses to obey an order for disclosure, the court "may make such orders with regard to the failure or refusal as are just among them: . . . dismissing an action or any part thereof. . .". Plaintiff's attorney's course of conduct in this case has frustrated the efforts of both the Court to move the case to trial and the defendant to conduct discovery. His series of unperfected appeals of each court order and requests for adjournments and stays resulted in numerous delays. He has shown both the defendants and Court an unwillingness to cooperate.

The alleged accident occurred nine (9) years ago and no EBTs of fact witnesses or the plaintiff have been taken. It may be impossible for defendant to even locate fact witnesses at this point. Even if such witnesses would be found, their recollection of the incident would be hazy. Where the defendants have been severely prejudiced by the dilatory tactics of the plaintiff, the complaint should be dismissed (see *Zletz v. Wetanson*, 67 NY2d 71, 490 NE2d 852, 499 NYA2d 933 [1986]).

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[1] On September 6, 1989, the Appellate Division dismissed all of plaintiff's appeals.

However, it must be acknowledged that some of the delays were occasioned either by the bankruptcy of defendants or by appeals taken by defendants from an entry of a default judgment against them. For that reason, the Court will give plaintiffs one more chance to comply with discovery orders on condition that $1,000 be paid to defendants' law firm on or before October 16, 1989.

Additionally plaintiff shall appear for an EBT on or before October 16, 1989 with a Yugoslavian interpreter to be paid for by defendants and CT Scans shall be furnished before that date. At least, one physical examination shall be conducted on or before October 23, 1989 with the others to be completed by November 15, 1989. The discovery shall be completed by December 31, 1989 and the matter shall be placed on the trial calendar by February 28, 1990. Failure to comply with any of the above directions shall result in the striking of the complaint and dismissal of the action.

The foregoing constitutes the decision and order of the court.

Dated: September 7, 1989

/s/ H.E.F.

J. S. C.

M-1

SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

Part 30

PRESENT: Hon. Helen E. Freedman, *Justice*

Mate Picinic,

—against—

Seatrain Lines, Inc., etc.

Index Number 16200/8
MOTION DATE 10/20/89
MOTION SEQ. NO. 007
TRIAL CAL. NO. 6 on 11/3

The following papers numbers 1 to 11 read on this motion to REARGUMENT

Notice of Motion/Order to Show Cause - Affidavits - Exhibits 1-4 & Sew Y-Motion	PAPERS NUMBERED 1-4
Answering Affidavits - Exhibits A&B&Sew	5-8
Replying Affidavits	9-11

Upon the foregoing papers it is ordered that this motion by plaintiff to reargue this court's decision of September 7, 1989 is denied and the defendants cross motion to dismiss the complaint with prejudice is granted. On September 7, 1989, this court ordered that the parties commence discovery and set up a schedule for all to follow. Rather than adhere to the schedule, plaintiff waited until the court ordered dates had passed and then moved to reargue the decision. Since the September 7 decision clearly states that failure to comply with the new discovery schedule will result in dismissal, the complaint is now dismissed. The foregoing constitutes the decision and order of the court.

Dated 11/16/89 /s/ HEF

J.S.C.

Kupferman, J.P., Sullivan, Milonas, Rubin, JJ.

41358 Mate Picinic,

Plaintiff-Appellant,

-against-

Seatrain Lines, Inc., et al.,

Defendants-Respondents.

Order, Supreme Court, New York County (Helen Freedman, J.), entered November 16, 1989, which, *inter alia*, granted defendants' motion to dismiss the complaint pursuant to CPLR 3126, unanimously affirmed, without costs.

The complaint in this negligence action arising out of an injury sustained by plaintiff, a longshoreman-checker, on April 28, 1980, while he was working at Port Seatrain in Weehawken, New Jersey, was dismissed upon plaintiff's failure to comply with court-ordered discovery and after plaintiff had been given one final opportunity to comply with defendants' discovery requests. The record amply supports the IAS court's determination that plaintiff had frustrated defendants' attempts to conduct discovery and disobeyed its September 7, 1989 conditional order of dismissal, which plaintiff had not appealed. Instead of adhering to the court-ordered schedule directing him to submit to an examination before trial with an interpreter, provide CT scans and appear for a physical examination, plaintiff waited until some of the court-ordered dates had passed and then sought reargument. Since plaintiff was well aware of the terms of the conditional order of dismissal, and no satisfactory excuse has been proferred for his non-compliance, dismissal of the complaint was proper. (*Zletz v. Wetanson*, 67 NY2d 711, 713). We note that since the commencement of this action in 1983, almost no discovery has taken place.

We have examined plaintiff's other contentions and find them to be without merit.

M-4332 & M-4441 *Mate Picnic v. Seatrain Lines, Inc., et al.*
Motion to file oversize reply brief granted.

Cross-motion to strike appellant's brief and for other relief granted only to the extent of striking material not properly before the Court and otherwise denied.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

ENTERED: January 8, 1991

s/ Francis X. Galdi
Clerk